Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-116

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

versus

BILLY B. WIMBERLY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice Of The United States And The Associate Justices Of The Supreme Court Of The United States:

Union Oil Company of California prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 18, 1975.

There is no written opinion of the District Court (Judge Joe J. Fisher, U.S.D.J.). This case was tried be-

fore a jury and judgment was entered upon the jury's verdict.

The court's charge to the jury is reproduced in the supplement beginning at page 13.

The opinion of the United States Court of Appeals for the Fifth Circuit (Circuit Judges Goldberg and Rooney and District Judge Grooms) is reproduced in the supplement beginning at page 21. It is unpublished and, as yet, not summarized in the American Maritime Cases.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on March 18, 1975. Petitions for Rehearing and Rehearing *en banc* were denied on April 23, 1975 and this Petition for a Writ of Certiorari is filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether a shipowner's warranty to a seaman in respect of the seaworthiness of his vessel should be judicially extended beyond the scope applied by this Court in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) to include a television set?

(2) Whether a shipowner's warranty of seaworthiness eliminates the necessity of proving a causal connection between an alleged back injury to a seaman who was on deck carrying a television set and a temporary interruption of power in the engine room of the vessel.

(3) Whether copies of medical records admitted into evidence under the business records rule are by themselves sufficient to establish the medical condition of a patient with a long history of back complaints.

STATUTE INVOLVED

The doctrine of unseaworthiness is based on the general maritime law as developed by this Court under Article 3, Section 2(1) of the Constitution of the United States.

The third point of the petition relates to the application of 28 U.S.C.A. 1732(a) and concerns the admissibility into evidence of medical records, as records made in the ordinary course of business, for all purposes without clarification by expert testimony.

STATEMENT OF THE CASE

On March 11, 1973, the Captain of the SS PURE OIL was notified that the television set which was located in the crew's mess room was not operating. At the Captain's request, the vessel's radio operator went to the mess room to check the set.

The set was given a preliminary examination in the mess room and nothing was found wrong, so it was then taken forward to the officer's lounge for further inspection. As soon as the set was plugged in, it performed perfectly.

After running the set for approximately one hour in the officer's lounge, Billy B. Wimberly, an off duty messman, picked it up and carried it aft to the crew's mess room.

The radio operator plugged the set into the electrical system in the crew's mess room and the set continued to work perfectly.

Thereafter, the radio operator ascertained that the trouble was in a converter (or inverter) in the engine room which converts the vessel's generator's direct current to alternating current for use in running the set.

It developed that between the time the set had been taken to the officer's lounge to the time it was returned to the crew's mess room, the engine room had switched from one electrical system to another and current to operate the TV set had been restored.

Billy B. Wimberly, as a seaman employed aboard the SS PURE OIL, filed an action on March 27, 1973 in the United States District Court for the Eastern District of Texas, Beaumont Division, against Union Oil Company of California to recover damages for personal injuries allegedly sustained on March 11, 1973 while carrying the television set back to the crew's mess room.

Wimberly alleged liability for negligence under the Jones Act and unseaworthiness of the vessel under the general maritime law. He also claimed liability for an allegedly unpaid balance due for maintenance.

In its answer Union Oil Company of California denied negligence; denied that the SS PURE OIL was unseaworthy; denied that any additional maintenance was due Wimberly; and alleged that if Wimberly had been injured, same was due to his own negligence.

The case was tried before Hon. Joe J. Fisher, U.S.D.J., and a jury on March 6 and 7, 1974.

Plaintiff tried the case on the theory that (1) the television set was defective and needed repair and (b) he slipped while carrying the set and that same caused or aggravated a back condition.

Wimberly was taken ashore in Wilmington, North Carolina on March 12, 1973 where he was treated for a muscle spasm and was flown home to Port Arthur, Texas. He reported to an outpatient clinic on March 13 and was found fit for duty on April 20, 1973.

Union Oil Company objected to and was granted a continuing objection at the trial to the introduction into evidence of medical records "for all purposes."

Plaintiff produced no doctor or medical expert to testify whether, or to what extent, if any, he had been injured while carrying the television set.

After both sides rested, the District Court charged the jury on unseaworthiness as follows:

> "And that while this duty cannot be delegated it is a duty only to furnish a vessel and appurtenances, tools and equipment *and the television in question would be considered equipment* which are reasonably fit for their intended use."

Union Oil Company objected to the charge. In response to the objection, the District Court stated:

> "We can appreciate the fact that it is necessary for you to object, Mr. Julian, and the court is not certain about this matter of the condition of the television set making the vessel unseaworthy. I have serious doubts that it will, but out of precaution I thought it was better to give it . . . ."

The jury returned the following verdict:

> "We the jury, find for the Plaintiff, Billy B. Wimberly, and assess damages at $14,000.00".

Judgment was entered in the District Court on March 21, 1974 against Union Oil Company of California ("Union") based on the jury's verdict. At the same time the court held that Wimberly was not entitled to an award for additional maintenance.

Union's motion for a new trial was denied by order dated March 29, 1974, following which Union filed on April 22, 1974, its notice of appeal to the United States Court of Appeals for the Fifth Circuit.

The judgment of the District Court was affirmed by a per curiam decision dated March 18, 1975.

Union petitioned on March 31, 1975 for a rehearing or, alternatively, a rehearing *en banc*. By letter dated April 23, 1975, the court advised that the petition was on that day denied, a copy of which is reproduced in the supplement beginning at page 22.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court of Appeals in approving the District Court's jury charge goes far beyond the limits set by this Court in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) and in *Usner v. Luckenbach Overseas Corp., et al.*, 400 U.S. 494 (1970).

In *Usner*, Mr. Justice Stewart, in delivering an opinion concurred in by Burger, Ch. J., and by White, Marshall and Blackmun, JJ., stated that the doctrine of liability based upon unseaworthiness has experienced over the last twenty-five years a remarkable expansion which began as a dictum in an obscure case in 1922; and that this Court's decisions since that time have been severly questioned by dissenting Justices of this Court and by others on the basis of history, reason, and logic.

In his separate dissent, Mr. Justice Harlan wrote that while he considered himself bound by *Crumady v. Fisser*, 358 U.S. 423 (1959), a case in which he had dissented together with Frankfurter and Whittaker, JJ., he had often protested the expansion of liability and that he would welcome a thoroughgoing re-examination of the past course of developments relating tc the unseaworthiness doctrine.

The District Judge in this case combined a negligence charge with an unseaworthiness charge, as if they were one and the same cause of action, which is diametrically contrary to the decisions of this Court in the *Mitchell* and *Usner* cases, and submitted for the jury's determination one general issue on liability.

Under the District Judge's charge, now approved by the Court of Appeals, there was absolutely no way for the jury to distinguish between negligence and unseaworthiness. Further, the District Judge charged the jury, in effect, that a television set which could not be turned on was defective, which, *ipso facto*, rendered the vessel unseaworthy.

The undisputed fact is that there was nothing wrong with the television set. The picture tube could not be activated only because one of two devices in the engine room which converts direct current to alternating current for use in operating the television set, was inoperative at the moment the first attempt was made to use the set. But when the other device was later used, the television set worked perfectly.

However, the Judge's use of the words

> ". . . and the basis for the unseaworthiness was the fact that it (the ship) had a television that was inoperative . . ."

in his charge to the jury, he left the jury no choice except to find liability.

(2) Assuming a defect in the television set, that of itself does not constitute unseaworthiness of a vessel as charged by the trial court. The shipowner's obligation is to provide a vessel reasonably fit for its intended use. *Mitchell v. Trawler Racer, Inc., supra.* The failure of a television set to work aboard ship hardly qualifies as unseaworthiness under the concepts announced by this Court that the ship must be "only reasonably fit". The rationale of the District Court's charge that if a television set is on board ship and it goes "on the blink", and someone in the process of carrying the set injures his back, then the vessel is unseaworthy, as a matter of law, since the television set was not reasonably fit for its intended use. Therefore, any time a television set is unworkable, the vessel is unseaworthy.

Petitioner submits that if a person is shocked by an electrical defect in a television set, then the set might be unfit for its intended use. However, on the other hand, when a television set is merely "on the blink", such does not under the present law in and of itself constitute an unseaworthy condition.

In this case, however, there was nothing wrong with the television set. The defect, if it may be called that, was in the inverter in the engine room which was not supplying electrical energy to the set.

Assuming that the engine room's failure to supply electricity to a television set is a defect, nevertheless, there is no causal relationship between that and a person who claims a back injury while carrying that or any other object on the deck of a vessel.

In the penultimate line of the majority opinion in the *Usner* case, the Court footnoted and quoted from a Second Circuit opinion, as follows:

> "A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness."

The decision from which the above was quoted, *Puddu v. Royal Netherlands S. S. Co.,* 303 F.2d 752 at 757, was made after an *en banc* hearing, and stands squarely for the proposition that there must be a causal relationship between a defective condition and an injury to establish liability for unseaworthiness.

The District Court's charge was not only incorrect, which it tacitly admitted, but also the reference therein to " . . . the fact that it had a television that was inoperative", when taken in conjunction with the comment in the charge that " . . . the television set in question would be considered . . . ship's equipment", gave the jury no choice other than to find liability. Under the court's charge, how else could a jury have answered?

A reading of the Second Circuit's *en banc* opinion in *Puddu* and this Court's opinion in *Usner* supports Mr. Justice Harlan's welcome of a thoroughgoing reexamination of the doctrine of unseaworthiness.

(3) Wimberly was treated by the Public Health Contract Physician at Wilmington, North Carolina, on March 12, 1973, and, after returning home, was seen on March

13 at the United States Public Service Outpatient Clinic at Port Arthur, Texas where his condition was diagnosed as "muscle spasm — low back".

It is not disputed that Wimberly sustained a back injury in 1967, spent 76 days in a hospital in Lima, Peru and underwent a laminectomy and that he has a history of back problems.

At the trial of the case the court admitted medical records into evidence, over Petitioner's objections, "for all purposes", as exceptions to the rule against admitting hearsay testimony.

The records and their contents were not interpreted by a doctor. The jurors were left to determine as best they could the meaning of complicated medical terminology which appeared throughout the records. In short, the jurors were left to make their own determination based on their own individual knowledge of medicine and not upon informed testimony of a medical expert.

Hospital and clinical records admitted into evidence under the Business Record Rule, 28 U.S.C.A. 1732(a), are not sufficient, by themselves, to establish that the medical condition of the patient with a long history of back complaints were solely and proximately caused by one shipboard incident. The holding of the Circuit Court in this case is directly contrary to its previous holding in *Lykes Bros. Steamship Company v. Grubaugh,* 128 F.2d 387 (5 Cir., 1942) and the holdings of the Eighth Circuit in *Skogen v. Dow Chemical Co.,* 375 F.2d 692 (8 Cir., 1967) and *Raycraft v. Duluth, M. & I. R. R.,* 472 F.2d 27 (8 Cir., 1973).

The Fifth Circuit in *Lykes Bros. Steamship Company v. Grubaugh, supra,* held in a Jones Act seaman's personal injury suit, that the defendant could not introduce into evidence a statement in the hospital records that the plaintiff was fit for duty when he was discharged; that the statutory exception to hearsay did not purport to make opinions admissible as evidence. This concern for the jury's objectivity was echoed in *Pritchett v. Etheridge,* 172 F.2d 822 (5 Cir., 1949).

Although the decision of the District Court was based on the Federal Rules of Evidence which were, in effect, at the time of the trial, new Rule 803, effective July 1, 1975, probably remains unchanged in respect of medical records and has widespread application in litigation throughout the federal judiciary.

CONCLUSION

The scope of the doctrine of unseaworthiness has been broadened explosively since its origin as dicta in 1922. Mr. Justice Harlan's suggestion that a thoroughgoing reexamination of that doctrine should be accepted as confusion continues to grow in this area of law. Further, differences in opinion in Congress in respect of the Federal Rules of Evidence promulgated by this Court on November 20, 1972, warrant examination of the business records rule.

Petitioner therefore respectfully prays that its petition for a *writ of certiorari* be granted.

July , 1975.

Respectfully submitted,

ROBERT M. JULIAN
1314 Texas Avenue, Suite 512
Houston, Texas, 77002
713/223-0031
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Petition for a Writ of Certiorari has been served upon counsel for the Respondent by mailing same to him on July _____, 1975, in a securely sealed, postage prepaid envelope addressed to Mr. James W. Mehaffy, Jr., Attorney at Law, 3550 Fannin, Beaumont, Texas 77701.

ROBERT M. JULIAN

SUPPLEMENT A

COURT'S CHARGE

THE COURT:

Members of the Jury, the Court will now give you the Charge. As we have told you in the beginning, you are a fact-finding body. You are the sole judges of the facts proved and the credibility of the witnesses and the weight to be given their testimony, but the law you will receive from the Court and be governed accordingly.

In your deliberation you must not discuss any facts or matters which are not based upon the evidence submitted before you under the rulings of the Court. You arrived at your verdict from a preponderance of the evidence. By the term "preponderance of the evidence" is meant the greater weight and degree [271] of credible evidence which has been admitted to you during the trial. It means that evidence which, if considered in the light of all of the facts and circumstances, you believe was a greater weight, it does not necessarily mean the greater number of witnesses.

Now, in this lawsuit the plaintiff in this case, Billy R. Wimberly, was a seaman and was on board the SS PURE OIL. He contends that he received an injury while on board this ship, an injury to his back on or about March 11, 1973. He contends that this injury was due to negligence on the part of officers of the vessel and also that this negligence was the contributing cause of his injury.

He furthermore contends that the vessel was unseaworthy. Now the term "unseaworthy" doesn't necessarily mean that the vessel wouldn't sail or wouldn't float, but

it is a legal term as used herein, it means that the defendant, the vessel, was under a duty to furnish the [272] plaintiff a seaworthy vessel. And that while this duty cannot be delegated it is a duty only to furnish a vessel and appurtenances, tools and equipment and the television in question would be considered equipment which are reasonably fit for their intended use.

The defendant does not have to guarantee the safety of the seaman or to furnish an accident-free ship. A ship or her appurtenances may be unseaworthy without it being the fault of anyone, as negligence is not a prerequisite to the determination of whether or not a vessel or its equipment is unseaworthy.

Now, in this connection, the plaintiff has the burden of proof. Plaintiff must prove from a preponderance of the evidence that the vessel at the time of the accident was unseaworthy and the basis for the unseaworthiness was the fact that it had a television that was inoperative and required it to be carried forward in the vessel for [273] the purpose of being repaired. And that in returning the television the plaintiff injured his back, which unseaworthiness was a proximate cause of his injuries.

Now, "proximate cause" means that cause which produces an event and without which event it would not have occurred. To be a proximate cause of an event it should have been reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that an event or some similar event would result in such cause as a natural and probable consequence. Therefore, the Court would charge you that if you find from a preponderance of the evidence that the vessel at the time in question, at the time the plaintiff sustained

his injury and you find that he did sustain an injury from a preponderance of the evidence and that such unseaworthiness was the cause of his accident and injury then you would find for the plaintiff and give consideration to the question of damages [274] that you would award the plaintiff.

Now we will turn to the obligation of negligence. The plaintiff also says that the officer, Mr. Mason, was negligent in not assisting him in carrying the TV and permitting him to carry it back to the place where it would be used by the crew. And that the negligence of the defendant through its officers and servants and agents contributed to and played a part, no matter how small, in causing his accidental injury. Therefore, the Court would instruct you that if you believe from a preponderance of the evidence that the defendant or any of its employees was negligent in the manner in which the plaintiff contends even in the slightest degree and that the negligence contributed to or played any part, no matter how small, in causing plaintiff's personal injuries, then the defendant is responsible for the injury and you would find for the plaintiff and give consideration to [275] the question of damages.

Now, the defendant contends that it was not guilty of negligence. Furthermore, they contend that the vessel was not unseaworthy. Therefore, the Court would charge you that if you fail to find the vessel was unseaworthy from a preponderance of the evidence and that the unseaworthiness was a proximate cause of the accident, you would find for the defendant on the issue of unseaworthiness. Likewise, on the issue of negligence, if you should find that the plaintiff had failed to prove from a preponderance of the evidence that the defendant, through its officer or fellow employees or its employees were

guilty of some act of negligence as contended for by the plaintiff and that such negligence contributed to or played any part, no matter how small, in causing the plaintiff injury, then you would find for the defendant. The defendant further contends that the plaintiff himself was contributorily negligent and that contributory negligence [276] was the sole cause or the entire cause or the complete cause of the injury, if any, that the plaintiff sustained.

Now, the burden of proving contributory negligence is upon the defendant. Contributory negligence does not defeat the right of a seaman to recover damages for any injury he has suffered if his injuries are a proximate cause in part, either by unseaworthiness or by negligence of the defendant.

"Contributory negligence" means the doing by the plaintiff of that which a person of ordinary prudence in the exercise of ordinary care would not have done under the same or similar circumstances or the failure by the plaintiff to do that which a person of ordinary prudence in the exercise of ordinary care would have done under the same or similar circumstances.

Therefore, if you should find that the plaintiff was himself guilty of contributory negligence in not getting assistance to help him carry the TV [277] and that such negligence was a proximate cause, then you would determine the extent to which his contributory negligence contributed to his injury and the damages, if any, that you award the plaintiff shall be diminished in proportion to the extent of negligence attributable to the plaintiff.

Now, those are the issues pertaining to the liability of the defendant and the right of recovery of the plaintiff.

Now, if you should find for the plaintiff under either the theory of negligence or unseaworthiness and do not find that his contributory negligence was the entire cause of his accident then you will give consideration to the question of damages, or if you find that he contributed to cause his accident by his own negligence which was a proximate cause, then you would reduce such damages as you might find as plaintiff is entitled to as a result of negligence on the part of the defendant or the vessel being [278] unseaworthy, and so indicate in your findings of damages.

Now, in this connection, the Court would instruct you that there is evidence in the record that the plaintiff had a pre-existing back condition. Now, this pre-existing back condition will not prevent him from recovering damages if you find liability on the part of the defendant unless you find that his pre-existing condition is the sole cause of the disability that he suffered after the incident of March 11, 1973, while a seaman on the SS PURE OIL. If you should find that his disability is entirely due to a pre-existing back condition and not to the accidental injuries he contends on the SS PURE OIL on March 11, then, of course, you would not find any damages for the plaintiff. On the other hand, if you find that the accidental injury which the plaintiff contends that he suffered on March 11, 1973, on the SS PURE OIL precipitated or incited or aggravated the pre- [279] existing condition, then you may find damages to the extent of the disability that he has sustained as a result of the aggravation. In this connection, you would determine the pecuniary loss sustained by plaintiff from the time of his injuries until the date of the trial because of his inability to work and earn money. You would also determine the present cash value of the pecuniary loss that the plain-

tiff will in reasonable probability sustain in the future beyond the date of his trial because of his inability to work and earn money.

In other words, his loss of earning capacity. Third, the mental and physical pain and suffering that the plaintiff has endured from the time of his injury up to the time of the trial and in the future. And you will indicate the present value of these damages in dollars and cents.

Now, the Court has prepared the form of verdict that you may use in [280] reaching your verdict. One is: "We, the jury, find for the plaintiff, Billy R. Wimberly, and assess damages at blank dollars," to be filled in by the jury and a place to be signed by the foreman and by each member of the jury. The other form of the verdict being: "We, the jury, find for the defendant, Union Oil Company of California", a place to be signed by the foreman and to be followed with the signatures of the other five members of the jury. A place to be dated.

Now, in conclusion the Court would say that this case, like any other, is to be decided by you fairly and calmly with careful, honest and conscientious consideration given to the evidence submitted under the rulings of the Court. In weighing the credibility of the witnesses and the weight to be given their testimony you must take into consideration the interest and the motive that may have prompted each and all of [281] the witnesses to testify in the manner in which they have testified. Do not let bias, prejudice, sympathy, resentment or any such emotion play any part in your deliberation or speculate on matters not shown by the evidence.

Now, Ladies and Gentlemen, we are going to submit the case to you and it will be at this time that you may

begin your deliberation for the purpose of reaching a unanimous verdict. In other words, the verdict must be the verdict of each and every one of you.

The exhibits that have been offered in evidence will be sent to you upon request by your foreman in writing. If it is necessary for the jury to communicate with the Court further to seek any further instructions, you will do so in writing through your foreman.

The attorneys have a right to make observations and objections to the Court's Charge and if we have overlooked something that we should have given you [282] in the Charge, then it may be necessary for us to call you back and give you further instructions. We do not anticipate that this will be necessary at this time.

Now, Mr. Liday, you being the alternate juror, I suppose we will have to excuse you at this time. We are sorry that we will not be able to permit you to join the jury in their deliberations, but we appreciate your presence and your willingness to serve as a juror. We will excuse you until May 6, at which time we will expect the jury, entire jury panel to return. That will be Monday, May 6, at 10:00 o'clock.

All right, if you will follow the Marshal to the jury room and begin your deliberation.

(REPORTER'S NOTE: Whereupon the jury retired for deliberation at 10:45 A. M.)

THE COURT:

Mr. Mehaffy, do you have any observations or objections to make [283] to the Court's Charge?

MR. MEHAFFY:
We have no objections, Your Honor.

THE COURT:
Mr. Julian?

MR. JULIAN:
Your Honor, I believe that portion of the charge which was related to unseaworthiness concerning the TV set, I don't think that comes within the doctrine of unseaworthiness as we understand it and it applies in law. I understood from our discussion last night that perhaps the Court might agree or disagree with me, but you were going to put it in anyhow. I wanted to protect my position, my record, and I do not believe that was covered. Apart from that, I have no other objections to it.

THE COURT:
We can appreciate the fact that it is necessary for you to object, Mr. Julian, and the Court is not certain about this matter of the condition of the television set making the vessel unseaworthy. I have serious doubts that it will, but out of pre- [284] caution I thought it was better to give it. As I understand, you object not to the form of the Charge, but to the substance?

MR. JULIAN:
Yes, that's right, Your Honor. Thank you, sir.

THE COURT:
We will stand in recess, awaiting the verdict of the jury.

SUPPLEMENT B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2207

BILLY B. WIMBERLY,
Plaintiff-Appellee Cross-Appellant

vs.

UNION OIL COMPANY OF CALIFORNIA,
Defendant-Appellant Cross-Appellee

Appeals from the United States District Court for the Eastern District of Texas

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(March 18, 1975)

Before: GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

SUPPLEMENT C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

April 23, 1975

TO ALL COUNSEL OF RECORD

Re: 74-2207 — Billy B. Wimberly vs. Union Oil Co. of California

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ BARBARA KREI
Deputy Clerk

cc: Mr. Robert M. Julian
Mr. James W. Mehaffy, Jr.

Supreme Court, U. S.
FILED
AUG 18 1975
...K, JR., CLERK

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now BILLY B. WIMBERLY, Respondent, and makes and files this response in opposition to the petition

for a writ of certiorari herein, praying that the petition be in all things denied.

JURISDICTION

The potential jurisdiction of the Court is admitted.

The Respondent strenuously asserts that certiorari should be denied, however, since there is no special or important reason for granting the same in this case.

This is a routine Jones Act personal injury case, and the decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor is there any other consideration, under Rule 19, Rules of the Supreme Court of the United States, which would justify granting the petition in the sound judicial discretion of the Court. Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. *Rice v. Sioux City Memorial Parks Cemetery,* 75 S. Ct. 614, 349 U.S. 70, 90 L.Ed 879 (Iowa 1955). Clearly this case involves no such considerations.

QUESTIONS PRESENTED

Being mindful of Rule 24 and 41, Rules of the Supreme Court of the United States, the Respondent vigorously disagrees that this case involves the questions stated on Pages 2 and 3 of the Petition, or that those questions are presented in any way by the appeal of this case. Instead, the Respondent asserts that the following questions

are presented by this appeal and that those questions are to be answered, and have been answered, in the affirmative, by the overwhelming weight of clear and cogent authority:

1. Isn't it true that a defect in a ship's own integral electrical system can render it unseaworthy?

2. Isn't it true that insufficient manpower or assistance for a particular job may render a vessel unseaworthy?

3. Isn't it true that medical records may be admitted into evidence on the trial of a personal injury case, under the applicable state and federal statutes and authorities?

STATEMENT OF THE CASE

This is a routine, straightforward, uncomplicated Jones Act case in which the plaintiff was suing for personal injuries sustained in the course and scope of his employment aboard defendant's vessel. There is absolutely nothing novel about the case; it is exactly like literally thousands upon thousands of other cases which have been settled by the weight of ancient authority and a jury's verdict.

Wimberly was employed by Union Oil as a seaman and member of the crew of the SS PURE OIL, an ocean-going tanker.

On March 10, 1973, Wimberly and some other seamen were back in the crew mess; the television set would not work properly; and the radio operator came back to attempt to fix the set. The radio operator could not get the set working in the crew mess, so he asked Wimberly to take the set up forward to the midshiphouse where he, the

radio operator, would work on it. After the radio operator had worked on the T.V. set in the midshiphouse, Wimberly was called upon to carry it back to the crew mess in the afterhouse. The ship was at sea, it had been misting rain, the wind had been blowing, and the catwalk was wet. As Wimberly was carrying the console model T.V. set by himself, his feet slipped out from under him just as he was about to go into the afterhouse.

The radio operator was walking right behind Wimberly as he carried the heavy T.V. set along the catwalk, from the midshiphouse back to the afterhouse. Although it was a two-man job, the radio operator neither assisted Wimberly, nor did he offer to get him anybody else to help him with the T.V. set.

The plaintiff went to trial on the theory that the ship was unseaworthy and the defendant negligent, because the radio officer did not call out anyone to help Wimberly with the T.V. set, and did not himself assist Wimberly.

Significantly, it had developed that the reason the television set would not play was not the result of any fault in the set; instead, an inverter in the ship's own electrical system went out, and it was this fault within the ship's own system that was causing the problem. In other words, the defect was in the ship itself, because the set worked perfectly.

The Court charged the jury that the plaintiff could recover either on unseaworthiness, or on negligence. The jury returned a verdict in favor of Wimberly, and a judgment thereupon was entered.

ARGUMENT

I.

The clear and uncontroverted evidence upon the trial of this case showed that:

1. **The plaintiff got hurt because of a failure of the ship's own electrical system; and**
2. **The plaintiff got hurt because he was not given assistance to perform a two-man job.**

In the face of this *uncontroverted* evidence, the petitioner claims an insufficiency of evidence to support a recovery on the theory of unseaworthiness. Literally, the petitioner's position is ludicrous, and the petition is frivolous.

There is no question that the breaking and failing of an integral part of the ship's electrical system renders the vessel unseaworthy. Thus, in *Hudson Waterways Corporation v. Schneider*, 365 F.2d 1012 (C.A. 9, 1966), the seaman was injured when he was shocked by defective wiring in the ship's electrical system. The Court held that, even though Schneider was engaged in repairing the defect at the time of his injury, the defect rendered the vessel unseaworthy and Schneider was therefore entitled to recover for that injury. *Schneider* stands for the proposition that a seaman is entitled to recover unseaworthiness indemnity for injuries caused by a failure of a component in the ship's electrical system. Here, Wimberly was injured as a result of a failure of a component in the ship's electrical system. It is difficult to conceive of any argument denying the application of *Schneider* to the instant situation.

Another case supporting the judgment is *Texas Menhaden Company v. Johnson*, 332 F.2d 527 (C.A. 5,

1964). There, the trial court judgment was for the plaintiff, and in affirming that judgment, the Court said, at Page 528:

> "And it is settled law that failure of a piece of equipment under proper and expected use is a sufficient predicate for a finding of unseaworthiness."

Here, the piece of equipment was the ship's own integral electrical system. It failed under proper and expected use, and that failure directly and proximately resulted in the plaintiff's injury. Indeed, the plaintiff should have had an instructed verdict in his favor on the issue of unseaworthiness.

II.

In addition to the fact that Wimberly's injury was caused by a defect in the ship itself, the evidence was also uncontroverted that Wimberly was doing a two-man job by himself. The law is abundantly clear that insufficient manpower for a particular job renders a vessel unseaworthy. Thus, in *American President Lines v. Welch,* 377 F.2d 501, cert. denied 389 U.S. 940 (C.A. 9, 1967), a seaman was injured while carrying a large heavy piece of a pump. It was determined in the District Court that the job, done by the seaman alone, was really a two-man job. The Court, in affirming a finding that the vessel was *unseaworthy,* said at Page 504:

> "In the present case repairing the lube pump was a two-man job and it was dangerous for one man to proceed alone. We hold that the SS PRESIDENT ROOSEVELT was improperly manned when Appellee repaired the lube pump without being supplied with adequate help."

The inadequacy of the help, said the Court, was not only evidence of the defendant's negligence; additionally, it constituted actionable *unseaworthiness.*

The Fifth Circuit, in a decision in which its Chief Judge participated, reached exactly the same conclusion. In *Moschi v. SS Edgar F. Luckenbach,* 424 F.2d 1060 (C.A. 5, 1970), the plaintiff was assigned to lift and remove a motor in the engine room of the vessel. The Trial Court found that the job plaintiff was assigned to do alone was a two-man job, and in view of the inadequacy of assistance, held the vessel *unseaworthy*. The Court, speaking PER CURIAM, affirmed the District Court's finding of unseaworthiness. The Court discussed the finding of contributory negligence, and then went on to say, at Page 1061:

> "But that does not discharge the vessel from the responsibility of supplying adequate personnel available in the first instance for performance of a task."

In short, inadequacy of personnel for a particular task can render a vessel unseaworthy; in this case, the testimony of the inadequacy of personnel more than supported the jury's finding.

III.

The petitioner also makes complaint of the entry of certain hospital records. Petitioner does not identify the particular portions of the records, nor the diagnoses or entries complained of. It is impossible to meet the Petitioner's objection, or to pass upon them, in any intelligible way.

Rule 43, Federal Rules of Civil Procedure, provides in pertinent part as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case, the statute or rule which favors the reception of the evidence governs.* . . ." [Emphasis supplied]

In other words, the most liberal rule of evidence, either that of Texas state practice or that provided by federal statute, governs.

The applicable federal statute is indeed 28 U.S.C.A. Section 1732, generally called the Federal Business Records Act. Generally speaking, that statute has been construed to permit the reception into evidence of hospital records, even when those hospital records contain certain opinions by the attending physicians. Thus, as it was said in 9 A.L.R. Fed. 457, at Page 482:

> "The courts have generally had no difficulty in respect of the Federal Business Records Act's application to entries relating to palpable physical conditions, even when they reflect diagnostic observations that are arguably in the nature of opinion, holding that hospital records showing the nature and extent of a patient's injury or disease *are admissible* in evidence under 28 USC Section 1732(a)." [Emphasis supplied]

The treatise then goes on to discuss the pertinent authorities, concluding that routine diagnoses are indeed admissible.

In summary, the Petitioner has nowhere pointed out the particular entries to which it objects, and it is impossible

to pass upon this point. All the records were routine, straightforward, and clear, however, and there was not even the slightest suggestion that any material was speculative or conjectural, or that any physician disagreed with any of the entries. Significantly, Union Oil did not call any medical witness of its own or offer any medical records itself, nor did it ever take the position that the records were incorrect. Clearly the records were entirely admissible under the applicable statutes and cases.

CONCLUSION

The evidence on the trial of the case showed that the plaintiff got hurt because the ship's own electrical system was defective, and failed, and also because the plaintiff was not given sufficient manpower or assistance for the job at hand. Manifestly, upon this evidence the jury was justified in finding that the vessel was unseaworthy, and that that unseaworthiness proximately caused the plaintiff's injuries. The hospital records are clearly admissible under the statutes and cases, and should have been received in evidence for all purposes.

There is no special or important reason for the granting of the Petition, and in the sound judicial discretion of the Court the Petition should be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to Petition for a Writ of Certiorari has been served upon counsel for the Respondent by mailing same to him on August 15, 1975, in a securely sealed, postage prepaid envelope addressed to Mr. Robert M. Julian, 1314 Texas Avenue, Suite 512, Houston, Texas 77002.

JAS. W. MEHAFFY, JR.